[Cite as *In re M.W.*, 2010-Ohio-6362.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94737

IN RE: M.W.

A Minor Child

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. DL 09115470

BEFORE: Boyle, J., Rocco, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: December 23, 2010

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MARY J. BOYLE, J.:

{¶ 1} Appellant, M.W., appeals the judgment of the Cuyahoga County Common Pleas Court, Juvenile Division, which found him delinquent by reason of committing aggravated robbery and placed him in the custody of the Ohio Department of Youth Services ("ODYS"). We affirm.

Procedural History and Facts

{¶ 2} On August 22, 2009, a complaint was filed against M.W., alleging that he was delinquent for aggravated robbery in violation of R.C.

2911.01(A)(1), a felony of the first degree if committed by an adult, with a gun specification. The complaint further alleged that M.W. was 15 years old at the time of the offense. He pleaded not guilty to the charge. The state sought to transfer the case to the general division and have M.W. tried as an adult. Although the court found probable cause to do so, it ultimately decided that M.W. was amenable to the juvenile justice system and retained jurisdiction. The matter proceeded to an adjudicatory hearing before a magistrate.

{¶ 3} The allegations giving rise to the complaint were that in the late evening of August 19, 2009, M.W., along with another juvenile, robbed the victim at gunpoint in the vicinity of Tremont and Jefferson avenues in Cleveland. Among other things, the state offered into evidence a written statement signed by M.W. wherein he confessed to his involvement in the robbery. Specifically, he stated the following: "I watched [the co-delinquent]'s back, I kept anyone from walking up on him or watched for the police." He further stated that the co-delinquent carried the firearm. He also acknowledged that the money was supposed to be split between the two of them, but that the co-delinquent was caught before they had a chance to divide the money.

{¶ 4} The magistrate ultimately found that the state proved the allegations of the complaint beyond a reasonable doubt, thereby finding M.W. delinquent of the charge of aggravated robbery and the three-year firearm

specification. The trial judge subsequently adopted and affirmed the magistrate's decision and placed M.W. in the custody of the ODYS for an indefinite term consisting of a minimum period of 12 months and a maximum period not to exceed his attainment of 21 years of age.

{¶ 5} M.W. appeals, raising the following three assignments of error:

{¶ 6} "[I.] The trial court violated M.W.'s right to due process when it admitted into evidence the typed statement of M.W.'s custodial statements to the police, which were obtained in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Section 16, Article I of the Ohio Constitution and R.C. 2151.352.

{¶ 7} "[II.] The trial court committed plain error and violated M.W.'s right to due process when it admitted into evidence the typed statement of M.W.'s custodial statements to the police, because those statements were elicited in violation of M.W.'s constitutional right against self-incrimination.

{¶ 8} "[III.] M.W. was denied effective assistance of counsel as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution."

{¶ 9} For the ease of discussion, we will address these assignments of error out of order and together where appropriate.

Ineffective Assistance of Counsel

{¶ 10} In his third assignment of error, M.W. argues that his trial counsel was ineffective for failing to file a motion to suppress his written statement. According to M.W., the statement arose out of the police's unlawful interrogation of him, where he was not provided counsel despite not having knowingly, voluntarily, and intelligently waiving his *Miranda* rights. We disagree.

{¶ 11} To succeed on a claim of ineffective assistance, a defendant must establish that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. Counsel will only be considered deficient if his or her conduct fell below an objective standard of reasonableness. *Strickland* at 688. When reviewing counsel's performance, this court must be highly deferential and "must indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance." Id. at 689. To establish resulting prejudice, a defendant must show that the outcome of the proceedings would have been different but for counsel's deficient performance. Id. at 694.

{¶ 12} "'[F]ailure to file a motion to suppress is not per se ineffective assistance of counsel.'" *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, 721 N.E.2d 52, quoting *Kimmelman v. Morrison* (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305. Failure to file a motion to suppress

constitutes ineffective assistance of counsel only if, based upon the record, the motion would have been granted. *State v. Robinson* (1996), 108 Ohio App.3d 428, 433, 670 N.E.2d 1077.

{¶ 13} Thus, we must determine from the record whether a motion to suppress would have been granted if M.W.'s trial counsel had filed one. If so, M.W.'s counsel was ineffective for failing to file it.

{¶ 14} Relying on the arguments asserted in his first two assignments of error, i.e., that he was denied his right to counsel during the police's interrogation of him and that he did not knowingly, voluntarily, and intelligently waive this right, M.W. argues that, had his trial counsel filed a motion to suppress his statement on either grounds, the trial court would have granted it. We will address each of his arguments in turn.

Right to Counsel

{¶ 15} M.W. argues that his statement was taken in violation of his right to counsel under R.C. 2151.352, which provides juveniles with the right to counsel that goes beyond constitutional requirements. See *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶83. Specifically, R.C. 2151.352 provides that "[a] child * * * is entitled to representation by legal counsel at all stages of the proceedings under this chapter of Chapter 2152 of the Revised Code."[1] Relying on *In re C.S.*, M.W. contends that this right to

[1] Chapter 2152 of the Ohio Revised Code specifically deals with juvenile

counsel under R.C. 2151.352 is absolute, even for purposes of an interrogation, and that it cannot be waived when neither his parent nor attorney has counseled him regarding a waiver of this right. We find M.W.'s argument unpersuasive.

{¶ 16} First, as recently recognized by the Third District, R.C. 2151.352 does not consider an "investigatory interrogation" as a "stage" of the proceeding under the statute. *In re Forbess*, 3d Dist. No. 2-09-20, 2010-Ohio-2826, ¶33. Indeed, a juvenile proceeding does not commence until the filing of a complaint. Id. Thus, because no complaint had been filed against M.W. at the time of the police interrogation, R.C. 2151.352 does not apply. And while M.W. did have a Fifth Amendment right to counsel under *Miranda*, he never exercised that right.

{¶ 17} Second, we find M.W.'s application of *In re C.S.* misplaced. In that case, the Ohio Supreme Court held that "in a delinquency proceeding, a juvenile may waive his constitutional right to counsel, subject to certain standards articulated below, if he is counseled and advised by his parent, custodian, or guardian. If the juvenile is not counseled by his parent, guardian, or custodian and has not consulted with an attorney, he may not waive his right to counsel." *In re C.S.* at ¶98. The Court's holding,

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offenses, with the commencement of juvenile delinquency proceedings beginning with the filing of a complaint. *Wright v. State* (1990), 69 Ohio App.3d 775, 781, 591 N.E.2d 1279.

therefore, is limited to a "delinquency proceeding"; it has no bearing on a juvenile's waiver of *Miranda* rights during a police interrogation prior to the commencement of a delinquency proceeding.

{¶ 18} Accordingly, because we find no violation of M.W.'s right to counsel under R.C. 2151.352, we cannot say that his trial counsel was ineffective for failing to move to suppress M.W.'s statement on this basis.

Voluntariness of the Waiver and Statement

{¶ 19} M.W. also argues that his statement should have been suppressed because he did not knowingly, voluntarily, and intelligently waive his *Miranda* rights, thereby rendering his confession inadmissible. We disagree.

{¶ 20} "Juveniles are entitled both to protection against compulsory self-incrimination under the Fifth Amendment and to *Miranda* warnings where applicable. Any statements made by a suspect may not be used in evidence where those statements were made during a custodial interrogation unless *Miranda* warnings were properly given to the suspect." (Internal quotations and citations omitted.) *In re Forbess*, 2010-Ohio-2826, at ¶27. See, also, *In re Gault* (1967), 387 U.S. 1, 54, 87 S.Ct. 1428, 18 L.Ed.2d 527; *Miranda v. Arizona* (1966), 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694. A suspect, therefore, may either waive or invoke his *Miranda* rights, including his Fifth Amendment right to counsel, and, if a request for counsel

is made, the interrogation must not recommence until counsel is present. *In re Forbess* at ¶28.

{¶ 21} In determining whether a juvenile has properly waived his *Miranda* rights, the reviewing court must examine the totality of the circumstances surrounding the waiver, "'including the age, mentality, and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; the existence of physical deprivation or mistreatment; and the existence of threat or inducement.'" *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶57, quoting *State v. Edwards* (1976), 49 Ohio St.2d 31, 358 N.E.2d 1051, paragraph two of the syllabus.

{¶ 22} Based on our review of the record, we find that M.W.'s waiver of his right to counsel was voluntarily given. First, M.W. testified at trial that he was told his *Miranda* rights prior to making a statement and that he understood such rights. Aside from M.W.'s own admission, the factors we must consider support our conclusion that the waiver was voluntarily made. Here, the record reveals that M.W. has had prior experiences with the police and that he has been adjudicated delinquent in other cases. M.W., who was 15 at the time of the interrogation, further exhibited the mental and emotional capacity to voluntarily waive his rights. According to the detective, M.W. acted "normal" and was not under the influence of drugs or alcohol at the time of the interrogation. There was no evidence that M.W.

had a diminished understanding, and he openly admitted that he could read. Further, the interrogation lasted only 35 minutes. Based on all these circumstances, we do not believe that M.W.'s trial counsel was ineffective for failing to move to suppress his statement based on an involuntary waiver of *Miranda* rights.

{¶ 23} Finally, to the extent that M.W. also implies that his statement is rendered involuntary because his mother was not present, the Ohio Supreme Court has expressly rejected this argument. See *In re Watson* (1989), 47 Ohio St.3d 86, 548 N.E.2d 210. Indeed, "a juvenile's confession is not rendered involuntary where the juvenile does not have either a parent or an attorney present." *In re Howard* (1997), 119 Ohio App.3d 33, 694 N.E.2d 488.

{¶ 24} Accordingly, because we find that a motion to suppress on either ground would have been futile, we cannot say that M.W.'s trial counsel was ineffective.

{¶ 25} The third assignment of error is overruled.

Admission of the Statement

{¶ 26} In his first two assignments of error, M.W. contends that his statement was erroneously admitted into evidence for the same reasons that his trial counsel was ineffective, i.e., the statement was taken in violation of his right to counsel under R.C. 2151.352, and he did not voluntarily waive his

Miranda rights. But based on our previous discussion, we find no error, plain or otherwise. See Crim.R. 52(B). Accordingly, the first two assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR