

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

IN THE MATTER OF:	:	O P I N I O N
M.E., JR.,	:	
ALLEGED DELINQUENT CHILD	:	CASE NO. 2010-G-2996
	:	8-12-11

Criminal Appeal from the Geauga County Court of Common Pleas, Juvenile Division, Case No. 10 JD 000418.

Judgment: Affirmed.

David P. Joyce, Geauga County Prosecutor, and *Nicholas A. Burling*, Assistant Prosecutor, Courthouse Annex, 231 Main Street, Chardon, OH 44024 (For Appellant-State of Ohio).

David M. Lynch, 29311 Euclid Avenue, #200, Wickliffe, OH 44092 (For Appellee-M.E., Jr.).

DIANE V. GRENDELL, J.

{¶1} Appellant, the State of Ohio, appeals from the judgment of the Geauga County Court of Common Pleas, Juvenile Division, granting appellee, M.E.’s, Motion to Suppress Illegally Obtained Evidence. The issue to be decided in this case is whether statements to a juvenile that he will not be arrested and that everything will be “okay” are coercive police conduct for the purposes of suppressing a confession. For the following reasons, we affirm the decision of the court below.

{¶2} On July 28, 2010, Mark Clark, a sexual abuse investigator for the Geauga County Prosecutor’s Office, received information related to potential sexual abuse

committed by M.E., a sixteen-year-old boy, against his six-year-old half-sister. M.E., his parents, and his sister were asked to respond to Geauga County Job and Family Services to discuss the abuse allegations. Subsequently, M.E. was taken to a conference room and interviewed by Clark. M.E. made statements regarding the abuse and gave an oral confession during the course of this interview.

{¶3} On August 16, 2010, M.E. was charged with four counts of Rape, in violation of R.C. 2907.02(A)(1)(b), felonies of the first degree if committed by an adult, and two counts of Gross Sexual Imposition, in violation of R.C. 2907.05(A)(4) and (B), felonies of the third degree if committed by an adult.

{¶4} M.E. filed a Motion to Suppress Illegally Obtained Evidence on October 8, 2010, requesting that the court suppress any statements made by M.E. to Clark, including M.E.'s oral confession. M.E. asserted that his confession was not voluntary.

{¶5} The trial court held a suppression hearing on October 14, 2010. At the hearing, Clark testified that on July 28, 2010, he advised both M.E.'s mother and father of M.E.'s Miranda rights and both parents gave Clark permission to interview M.E. Clark stated that he led M.E. into a conference room that had an adjoining window and was monitored by closed circuit television. Clark testified that he told both parents they could watch the interview on the closed circuit television, but the father refused to do so. Clark testified that he shut the door to the conference room "for privacy reasons." Clark stated that, at the outset of the interview, he advised M.E. he was free to leave at any time and had the right not to talk to Clark. Clark further testified that the interview with M.E. lasted approximately thirty to thirty-five minutes and M.E. appeared to be "very perceptive" and was a "very intelligent boy."

{¶6} At the hearing, M.E.'s counsel introduced a transcript and a recording from the interview between Clark and M.E. The transcript indicates that, at the beginning of the interview, prior to any confession given by M.E., Clark told M.E. that he was a police officer, investigated crimes, and stated that "I want you to make sure that you understand that you are not under arrest right now, and that regardless of what we talk about today, you are not going to be under arrest." After asking M.E. if this made sense, M.E. responded "yea." Clark then stated "[s]o your worry factor about being arrested should be very, very low, cuz it's not gonna happen."

{¶7} The transcript shows that Clark explained to M.E. his Miranda rights. Clark then told M.E. that "if we continue to talk, I want it to be on a voluntary basis, okay?" M.E. responded "okay" and affirmatively indicated that he understood his rights.

{¶8} The following exchange also occurred between M.E. and Clark during the interview:

{¶9} Clark: Okay. Do you get along well with your dad?

{¶10} M.E.: Mmm, not exactly.

{¶11} Clark: Alright. Um when I talked to [the victim], and she's a little, little girl and I give her all these little warnings about things and I told her this is a, a truth room. This is a, in this room, you know, we can only talk about things that really happened. Um and I know you're a little bit old for that, but you can tell me anything in here and it's gonna be okay.

{¶12} M.E.: Okay

{¶13} Clark: Alright? And, and I know that it's easy for me to say that and you're like, yea, right!, cuz you know I don't know what you might want to tell me. But I have some things I want to ask you, and I'm willing to listen to whatever answers you give me and whatever else it is you want to say. Alright?

{¶14} M.E.: Mmhmm.

{¶15} Clark: I understand that it's not easy to live in a divided household like you do, you know? I know that. It's not easy. It's not fun. ***

{¶16} During his testimony, Clark testified about his statement regarding whether M.E. was going to be arrested. Clark explained that he made this statement with the intention of informing M.E. that Clark "wasn't going to arrest him ever" and that, if M.E. was arrested, Clark "wasn't going to be the one to do it." Clark testified that he did not make any statements conveying to M.E. that he was never going to get into trouble or would not be criminally charged.

{¶17} Stephen Thompson, M.E.'s guardian ad litem, testified that he had "questions" about M.E.'s cognitive ability. Thompson explained that he had been informed, through conversations with M.E.'s counselor, that M.E. has an IQ "in the 70s" and is "borderline MR [mentally retarded]."

{¶18} M.E.'s parents both testified that they were not informed about M.E.'s Miranda rights or any other rights prior to Clark interviewing M.E. The mother also testified that M.E. has attention deficit disorder and is on an individualized education plan at school. She stated that Thompson's testimony regarding M.E.'s IQ was correct.

{¶19} M.E. testified that when Clark told him he would not be arrested, he believed this meant "anything that I would say, I would not get in trouble." Similarly, M.E. testified that when Clark stated that everything would be okay, M.E. believed this meant "anything I say I will not get in trouble." M.E. explained that these two statements made him feel "relaxed."

{¶20} M.E. also testified that he did not know the meaning of the word "voluntary" at the time of the interview. He stated that he had believed the word voluntary means "two people talking privately together" with no one else in the room.

{¶21} On October 29, 2010, the trial court issued a Judgment Entry granting M.E.'s Motion to Suppress. The trial court found that M.E. has "diminished cognitive capability." The trial court held that "it is very likely that the juvenile interpreted" Clark's statement that everything was going to be "okay" as an assurance of leniency. Similarly, regarding Clark's statement that M.E. would not be arrested, the court found that "while it is likely the investigator intended this statement to reassure the juvenile that he was not under arrest, it is likely that the statement contributed to the juvenile's impression that he could communicate his interaction with his sister truthfully without fear of serious consequences." The court held that M.E.'s confession was induced by false promises of leniency and, therefore, was not a voluntary confession.

{¶22} On November 4, 2010, the trial court stayed proceedings in this matter pending the outcome of this appeal.

{¶23} The State timely appeals, pursuant to Juv.R. 22(F), and raises the following assignment of error:

{¶24} "The trial court erred in granting appellee's motion to suppress when it incorrectly determined that appellee's confession was not voluntary."

{¶25} "The trial court acts as trier of fact at a suppression hearing and must weigh the evidence and judge the credibility of the witnesses." *State v. Ferry*, 11th Dist. No. 2007-L-217, 2008-Ohio-2616, at ¶11 (citations omitted). "The court of appeals is bound to accept factual determinations of the trial court made during the suppression hearing so long as they are supported by competent and credible evidence." *State v. Searls* (1997), 118 Ohio App.3d 739, 741. "Once the appellate court accepts the trial court's factual determinations, the appellate court conducts a de novo review of the trial

court's application of the law to these facts." *Ferry*, 2008-Ohio-2616, at ¶11 (citations omitted); *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19 ("[a]ccepting these findings of facts as true, a reviewing court must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the appropriate legal standard") (citation omitted).

{¶26} The State asserts that the statements made by Clark, when viewed in context, were not promises of leniency or coercive, and, therefore, M.E.'s statement was voluntary.

{¶27} We initially note that M.E. did not argue before the trial court that his confession was inadmissible because he was not given Miranda warnings. He instead argued that his confession was not voluntary. "The two issues -- compliance with *Miranda* and the voluntariness of a confession -- are analytically separate inquiries." *In re W.S.*, 11th Dist. No. 2009-G-2878, 2009-Ohio-5427, at ¶16, citing *State v. Chase* (1978), 55 Ohio St.2d 237, 246. Even in the absence of a violation of *Miranda*, a confession is inadmissible if it was not voluntary. *Id.*

{¶28} "As a general proposition, a confession will be deemed voluntary when it stems from a free and unconstrained choice of its maker; on the other hand, a confession will be viewed as involuntary when it is caused by coercive police action." *W.S.*, 2009-Ohio-5427, at ¶18, citing *State v. Quigley*, 11th Dist. No. 2004-G-2577, 2005-Ohio-5276, at ¶34.

{¶29} "There must be some evidence of coercion on the part of the police in order to trigger an analysis of the totality of the circumstances." *State v. Pohl*, 11th Dist. No. 2004-L-180, 2006-Ohio-200, at ¶20 (citation omitted). "A suspect's decision to

waive his Fifth Amendment privilege against compulsory self-incrimination is made voluntarily absent evidence that his will was overborne and his capacity for self-determination was critically impaired because of coercive police conduct.” *In re McDonald*, 11th Dist. No. 2006-L-027, 2007-Ohio-782, at ¶18, citing *State v. Dailey* (1990), 53 Ohio St.3d 88, at paragraph two of the syllabus. However, even in the presence of a promise of leniency, a confession is not automatically involuntary. “[A] promise of leniency must be coupled with other factors to render a confession involuntary under the totality of the circumstances test.” *State v. Copley*, 170 Ohio App.3d 217, 2006-Ohio-6478, at ¶18 (citations omitted). If the “circumstances indicate that the confession was coerced or compelled, it cannot be used to convict the defendant. That determination depends upon a weighing of the pressure to confess against the power of resistance of the person confessing.” *State v. Jenkins*, 192 Ohio App.3d 276, 2011-Ohio-754, at ¶50.

{¶30} “In deciding whether a juvenile’s confession is involuntarily induced, the court should consider the totality of the circumstances, including the age, mentality and prior criminal experience of the accused; the length, intensity, and frequency of interrogation; and the existence of physical deprivation or inducement.” *In re Watson* (1989), 47 Ohio St.3d 86, at paragraph one of the syllabus, citing *State v. Edwards* (1976), 49 Ohio St.2d 31, at paragraph two of the syllabus.

{¶31} Coercive police conduct includes police officers’ representations or promises of “leniency or benefit.” *State v. Arrington* (1984), 14 Ohio App.3d 111, at paragraph two of the syllabus; *W.S.*, 2009-Ohio-5427, at ¶20.

{¶32} During the suppression hearing, M.E.'s counsel called into question two statements made by Clark, both of which were found by the trial court to be improper promises of leniency. In the first statement, Clark told M.E. "you understand that you are not under arrest right now, and that regardless of what we talk about today, you are not going to be under arrest." The State argues that this statement, when viewed objectively, was not a promise of leniency.

{¶33} We first note that "scrupulous attention" must be given to the issues of voluntariness and understanding when dealing with a minor's confession. *State v. Davis* (1978), 56 Ohio St.2d 51, 54. See, also, *In re Goins* (1999), 137 Ohio App.3d 158, 162 ("[w]aivers of minors must be scrutinized closely since the validity of the waiver is affected by the factors of age, emotional stability and mental capacity") (citation omitted).

{¶34} We find Clark's statement that M.E. would not be arrested was an improper promise of leniency. Clark told M.E. he was "not going to be under arrest" and that "[y]ou're gonna walk out of here one way or the other. *** You're not under arrest." While Clark may have been attempting to represent to M.E. that he would not be taken into custody at the conclusion of the interview, his statement essentially conveyed that M.E. would not be under arrest at any time, regardless of any statements or confession he made. Such a statement could be objectively viewed as a promise that M.E. would not be criminally punished for his actions. "When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if *** the defendant *** might reasonably expect benefits in the nature of more lenient

treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible.” *Arrington*, 14 Ohio App.3d at 115 (citation omitted) (emphasis omitted); *Jenkins*, 2011-Ohio-754, at ¶50 (citation omitted). In this case, M.E. testified that the statement made him feel “relaxed,” and that it made him believe “anything that I would say, I would not get in trouble.” M.E. could have reasonably expected leniency in exchange for his confession, and thus, Clark’s statement was an improper promise of leniency.

{¶35} Moreover, the fact that M.E. was charged and could ultimately be convicted and taken into custody contradicts Clark’s promise that M.E. would not be arrested. See *State v. Jackson*, 2nd Dist. No. 02CA0001, 2002-Ohio-4680, at ¶39 (where a benefit offered to defendant by an officer was impossible to achieve, it was an improper promise of leniency).

{¶36} In addition, evidence that a suspect’s will was overborne supports a finding that a confession was involuntary. *State v. Wilson* (1996), 117 Ohio App.3d 290, 293. M.E. testified at the suppression hearing that the statement made him feel “more willing to speak to Investigator Clark.” M.E.’s mother also testified that, in watching the interview, she believed that Clark’s statement made M.E. “feel more comfortable” because he knew “he would not be going to jail.” When looking at all of the testimony offered, it appears that M.E.’s will and capacity for self-determination were influenced by Clark’s statement, leading to M.E.’s ultimate confession. See *State v. Petitjean* (2000), 140 Ohio App.3d 517, 534 (where evidence of the interrogation and testimony presented at the suppression hearing showed that a defendant confessed “after and

because of” the officer’s assurances, the defendant’s will was overborne and his confession was involuntary).

{¶37} As we have found Clark’s statement that M.E. would not be arrested improperly influenced M.E. to confess, we need not determine whether Clark’s second statement was coercive. This court must consider whether, under the totality of the circumstances, M.E.’s confession was involuntary. See *Pohl*, 2006-Ohio-200, at ¶20 (evidence of coercive behavior, such as a promise of leniency, triggers an analysis of the totality of the circumstances).

{¶38} A few factors weigh in favor of finding M.E.’s confession to be voluntary. Regarding the length and frequency of the interrogation, the interview between Clark lasted approximately 30 to 40 minutes and took place on only one occasion. In addition, there was no evidence of physical deprivation or inducement.

{¶39} However, the weight of the other factors supports a conclusion that M.E.’s confession was involuntary. M.E. is a juvenile and was only sixteen at the time of the confession. The record shows that he did not have prior criminal experience. In addition, evidence presented at the suppression hearing showed M.E.’s mental capacity is limited. Thompson testified that M.E.’s IQ was in “the 70s” and that he was “borderline mentally retarded.” Although Clark testified that M.E. appeared intelligent and was responsive to the questions, the trial court found M.E. has “diminished cognitive capability.” Since there is competent and credible evidence to support this, we accept the trial court’s finding that M.E. had limited mental capacity.

{¶40} When considering the coercive nature of Clark’s statement that M.E. would not be under arrest in conjunction with other factors, the totality of the

circumstances render M.E.'s confession invalid. See *State v. Waldo*, 2nd Dist. No. 99CA24, 2001-Ohio-1349, 2001 Ohio App. LEXIS 4224, at *12-*13 (a defendant's confession was involuntary under the totality of the circumstances where the defendant was twenty years old, had no prior contact with the criminal justice system, and police made a coercive statement that induced the defendant's confession); *Petitjean*, 140 Ohio App.3d at 534 (false promises made by an officer rendered a confession involuntary under the totality of the circumstances).

{¶41} Therefore, when viewing the totality of the circumstances and the representation of leniency given to M.E. by Clark, the trial court's determination that M.E.'s confession was involuntary is supported by the record and the trial court properly suppressed his confession.

{¶42} The sole assignment of error is without merit.

{¶43} For the foregoing reasons, the judgment of the Geauga County Court of Common Pleas, Juvenile Division, granting M.E.'s Motion to Suppress, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.