2013 PA Super 316

IN THE INTEREST OF: B.T.	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPEAL OF: B.T.	No. 1335 EDA 2012

Appeal from the Dispositional Orders of January 6, 2012,
in the Court of Common Pleas of Philadelphia County,
Juvenile Division, at No(s): CP-51-CR-JV0003613-2011, CP-51-CR-JV0003615-2011, CP-51-CR-JV0003616-2011, CP-51-CR-JV0003617-2011, & CP-51-CR-JV0003618-2011.

BEFORE: ALLEN, COLVILLE,* and STRASSBURGER,* JJ.

CONCURRING AND DISSENTING OPINION BY ALLEN, J.:**FILED DECEMBER 09, 2013**

B.T., allegedly born November 30, 2002, cannot have it both ways. He cannot claim that he was only eight years old[1] when the police questioned him on July 1, 2011, thereby avoiding the juvenile court's jurisdiction, but then argue that he is entitled to the constitutional protections of ***Miranda***, and suppression of the statements he made

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[1] There are instances in the record when B.T. is alleged to have been nine years old when questioned by police on July 1, 2011. N.T., 10/21/11, at 8-9. It does not matter, in our analysis, whether B.T. purported to be eight or nine when the police interviewed him. ***See*** 42 Pa.C.S.A. § 6302 (to be delinquent, a child must be ten years of age or older).

*Retired Judge assigned to the Superior Court.

regarding a majority of the burglaries for which he was adjudicated delinquent.

I fully agree with the Majority decision to affirm the juvenile court's denial of B.T.'s motion to dismiss. I dissent, however, from the Majority's conclusion that B.T.'s statements on July 1, 2011 with regard to a majority of the burglaries should have been suppressed due to a violation of ***Miranda v. Arizona***, 384 U.S. 436 (1986).

"When reviewing an order denying a motion to suppress evidence, we must determine whether the evidence of record supports the factual findings of the trial court." ***Commonwealth v. El***, 933 A.2d 657, 660 (Pa. Super. 2007). "In making this determination, this [C]ourt may only consider the Commonwealth's evidence and the defendant's evidence that remains uncontradicted." ***Id.*** "If the evidence supports the findings of the trial court, those findings bind us and we may reverse only if the suppression court drew erroneous legal conclusions from the evidence." ***Id.***

Here, the juvenile court summarized its factual findings as follows:

> On October 21, 2011, a hearing was held on [B.T.'s] Motion to Suppress. [B.T.] alleges that a statement and other incriminating data were taken from him amounting to confessions to several crimes, including burglary and conspiracy. The sequence of events in the interrogation and investigation is relevant and compelling:
>
> Detective Orlando Ortiz, assigned to Southwest Detectives in Philadelphia, spoke to [B.T.] on July 1, 2011 at 4:40 p.m. at [B.T.'s] home. Detective Ortiz asked the boy's age and was told he was nine years old. With that, Detective Ortiz knew that he could not arrest [B.T.]. There was a series of robberies [sic] in which Ortiz believed

> [B.T.] was involved. [Detective Ortiz] wanted information as to the co-conspirators so he requested and got permission to take [B.T.] to the district to question him.

Juvenile Court Opinion, 12/20/12, at 3-4.

The juvenile court then cited the following exchange between the Commonwealth and Detective Ortiz:

> Q: What did you say to his father?
>
> A: We basically told his father - - we asked his father [B.T.'s] age. At the time his dad told us that he was nine years old. So we knew we couldn't charge him with any burglaries, but we had suspicion that he might have committed several burglaries in the area, and that's what we were investigating.
>
> So we wanted information on other co-defendants, or locations that he might possibly [have] committed burglaries at in the area. So we explained everything to his dad, that he wasn't going to be charged. We just basically wanted to interview him just to get information on all these burglaries that we were investigating.
>
> Q: And what happened after you explained that to his father?
>
> A: His dad gave us permission. His dad was very cooperative with us. He explained to us that he had some problems with [B.T.]. He was informed of - - what we were doing. He had my partner's cell phone number and he gave us permission to - - for [B.T.] to come with us at the time.
>
> Q: Was [B.T.] handcuffed when you transported him to the district?
>
> A: No, he was not.
>
> Q: Where did he sit in the car?
>
> A: He sat in the back of our - - well, it's a police car, but it's a Ford [Taurus]. It's an unmarked Ford [Taurus].

> Q: And what happened when you got back to the district?
>
> A: We basically sat him down at our office. We fed him, we gave him pizza, and I interviewed him.
>
> Q: And what happed after the interview?
>
> A: After the interview we transported [B.T.] back home to his dad.

Juvenile Court Opinion, 12/20/12, at 4 (citing N.T., 10/21/11, at 8-9).

Approximately one month later, B.T. was caught committing a burglary, and the police obtained evidence that B.T. was over the age of ten. B.T. was therefore arrested for the latest burglary, as well as the additional burglaries he had confessed to in his July 1, 2011 police interview.

Based on the above facts, which are supported by my review of the record, the juvenile court listed the following reasons for denying B.T.'s motion to suppress:

> First, the investigation by Detective Ortiz on July 1, 2011, was an appropriate exercise of police authority. The interrogation of [B.T.] was a reasonable action designed to acquire information on his co-conspirators.
>
> Second, the Fourth Amendment and the case law, both State and Federal, place limitations on interrogation circumstances and techniques. These limitations come into play when law enforcement officials have narrowed their investigation down to a class of suspects who may not be questioned without ***Miranda*** warnings. [B.T.] contends that because he was not so warned, his statements should not be allowed at trial.
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> ***Miranda*** warnings are unquestionably required to be given once a person is placed under arrest. Such was clearly not the case here. Additionally, ***Miranda*** warnings are necessary when a person is subject to custodial

> interrogation. In these instances, the individual is not free to leave and is typically the subject of the investigation.
>
> In the instant case, [B.T.] was not in police custody in such a manner that would trigger ***Miranda***. As stated above, the police drove [B.T.] from his home to the police district and questioned [him] only after receiving permission from his father in an effort to assist them in their criminal investigation of certain crimes. There was no intention by the police to elicit incriminating information from [B.T.] for the purpose of charging him with any crime. [B.T.], who was fed pizza at the police district, knew that there was never any prospect that he would be taken into custody. Rather, he knew at all times, as did his father, that he would be driven home once he provided all necessary information to aid the police in their investigation of crimes that he would not be charged with.
>
> The [juvenile court] denied the motion because police were told, wrongly as it happens, that [B.T.] was nine years old and not chargeable with a crime. [A] ***Miranda*** warning would have served no purpose by their consideration [sic]. After [B.T.'s] interview they took him home and gave him to his father.
>
> Consequently, this Court did not err in denying [B.T.'s] motion to suppress.

Juvenile Court Opinion, 12/20/12, at 5-6. My review of the record supports the learned juvenile court's legal conclusions.

Pursuant to the Juvenile Act, a "delinquent child" is defined as a "child ten years of age or older whom the court has found to have committed a delinquent act and is in need of treatment, supervision, or rehabilitation." 42 Pa.C.S.A. § 6302. Moreover, in delinquency cases under the Juvenile Act, a child charged with delinquency enjoys the right to counsel, as well as other basic rights, including due process and the right against self-incrimination. ***See generally***, 42 Pa.C.S.A. §§ 6337-6338;

Commonwealth v. Brown, 26 A.3d 485 (Pa. Super. 2011). A child charged with a delinquent act also enjoys the protections afforded by ***Miranda***. ***See e.g.***, ***In Interest of Mellott***, 476 A.2d 11 (Pa. Super. 1984). "The law is clear that ***Miranda*** is not implicated unless the individual is in custody ***and*** subject to interrogation." ***Commonwealth v. Umstead***, 916 A.2d 1146, 1152 (Pa. Super. 2007). The absence of either factor vitiates the need for ***Miranda*** warnings. ***See id.***

Unlike the Majority, my review of the record leads to the conclusion that when Detective Ortiz interacted with B.T. on July 1, 2011, B.T. was neither in "custody" nor underwent "interrogation" for ***Miranda*** purposes.

Our Supreme Court has recently summarized:

> We have held a person is in custody for ***Miranda*** purposes only when he is physically denied his freedom of action in any significant way or is placed in a situation in which he reasonably believes that his freedom of action or movement is restricted by the interrogation. The standard for determining whether an encounter with the police is deemed custodial is an objective one based on a totality of the circumstances with due consideration given to the reasonable impression conveyed to the person interrogated.

Commonwealth v. Johnson, 42 A.3d 1017, 1028 (Pa. Super. 2012) (citations omitted). This Court has further explained:

> Indeed, police detentions only become "custodial" when under the totality of the circumstances the conditions and/or duration of the detention become so coercive as to constitute the functional equivalent of formal arrest.
>
> Among the factors the court utilizes in determining, under the totality of the circumstances, whether the

> detention became so coercive as to constitute the functional equivalent of a formal arrest are: the basis for the detention; the duration; the location; whether the suspect was transferred against his will, how far, and why; whether restraints were used; the show, threat or use of force; and the methods of investigation used to confirm or dispel suspicions.

Commonwealth v. Busch, 713 A.2d 97, 100-01 (Pa. Super. 1998) (citations omitted).

A consideration of the totality of the circumstances presented by this case clearly establishes that B.T. was not in "custody" for ***Miranda*** purposes. Because B.T.'s father declined to accompany his allegedly eight-year-old son, B.T. clearly was in the "custody" and the "care" of the detectives who fed him pizza, spoke with him for approximately one hour, and then took him home. The juvenile court concluded as much in the following statement made during the suppression hearing: "Under no circumstances was [B.T.] free to leave. The detective believed that he was eight years old and the detective had an obligation under any circumstance, to return him to his parents." N.T., 10/21/11, at 26. The Majority takes this statement out of context to determine that the record supports its conclusion that the juvenile court believed that B.T. was in custody for ***Miranda*** purposes. ***See*** Majority, at 13. In addition, had his father accompanied B.T. to the police station, there is no question that both the purported eight-or-nine year-old B.T. and his father would have been free to leave at any time.

"Interrogation" for ***Miranda*** purposes, "is defined as police conduct calculated to, expected to, or likely to evoke admission." ***Umstead***, 916 A.2d at 1152. By definition, given his asserted age, B.T. could not be charged with an act of delinquency under the Juvenile Act. ***See*** 42 Pa.C.S.A. § 6302. It therefore follows that B.T. could not be subject to "interrogation" for ***Miranda*** purposes. My review of the record supports the juvenile court's conclusion that, although B.T. was interviewed by the detectives, there "was no intention by the police to elicit incriminating statements for the purpose of charging him with any crime," and that B.T. "knew at all times, as did his father, that he would be driven home once he provided all necessary information to aid the police in their investigation of crimes that he would not be charged with." Juvenile Court Opinion, 12/20/12, at 5. Indeed, given his purported age, B.T. could not be charged with any act of delinquency.

In sum, because B.T. was neither in "custody" or subject to "interrogation" for ***Miranda*** purposes, the learned juvenile court properly denied his suppression motion. Considering the totality of the circumstances, B.T., with his father's permission, voluntarily accompanied the police to be interviewed and provide information regarding a rash of burglaries. The fact that Detective Ortiz subsequently learned information that permitted B.T.'s arrest for the burglaries does not retroactively convert B.T.'s interaction with the police on July 1, 2011 into a "custodial interrogation." ***See Umstead***, 916 A.2d at 1152 (holding that the

defendant was not subject to "custodial interrogation" when a corrections officer first questioned him about a prison assault, even though he later confessed to the crime).

At the suppression hearing, B.T.'s counsel presented a two-prong challenge to the statements given by B.T. on July 1, 2011. Counsel first challenged the admissibility of the statements given Detective Ortiz's alleged violation of ***Miranda***. Secondly, counsel asserted that, even if ***Miranda*** warnings were not required, B.T.'s statements were not voluntary, given B.T.'s age, his immigrant status, and education level. ***See*** N.T., 10/21/11, at 5.[2] In reaching its decision to reverse the juvenile court, the Majority conflates these two separate arguments. The Majority confuses the necessity of ***Miranda*** warnings in the first instance, with the question of whether B.T. could validly waive them. Without citation to the record, the Majority states that B.T. has "a stipulated IQ of 50." Majority, at 13. The Majority then cites this Court's recent decision in ***In re T.B.***, 11 A.3d 500 (Pa. Super. 2010) to "hold that it was error for the juvenile court to conclude that the Commonwealth met its burden of proving that Appellant's

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[2] My review of the record supports the Commonwealth's claim that B.T. waived his second argument because it was neither raised in B.T.'s statement of issues or in B.T.'s Pa.R.A.P. 1925(b) statement. ***See*** Commonwealth's Brief at 14, n.4. The juvenile court did not address this issue in its Pa.R.A.P. 1925(a) opinion. Rather, the Majority finds error based upon a statement made by the juvenile court at the suppression hearing. Majority at 12.

statements were made voluntarily, knowingly, and intelligently." ***Majority***, at 13.

The Majority's reliance on ***T.B.*** is inapt. ***T.B.*** involved the question of whether a fifteen-year-old offender, with an IQ of 67, could, without the input of an interested adult, validly waive his ***Miranda*** rights. ***T.B.***, 11 A.3d at 506-07. Unlike the facts of the instant case, the police in ***T.B.*** knew the offender's true age, and recognized the necessity of ***Miranda*** warnings. Additionally, the Majority makes the bare assertion that "[r]egardless of what the police thought or why they thought it, the fact of the matter is that [B.T.] had the right to remain silent rather than to incriminate himself." ***Majority***, at 13. In response to a similar argument by defense counsel that even children under the age of ten have constitutional rights, the juvenile court responded:

> **THE COURT:** The detective did not read [B.T.] his rights because the detective knew the function of reading him his rights, and going through the process. And there's no way that the detective was going to tell him, if you don't want to talk with me or I'll get you - - legal counsel will be provided, because none of that stuff was going to happen for an eight-year old, and ***Miranda*** is a process that you go through to protect people from the criminal sanctions, as a result of the constitution.
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> So, Detective Ortiz, did not owe him ***Miranda***, it's not the [constitutional] right when you're [not] ten years old ... And there's no reason, if you fully believe that a person cannot be prosecuted, there's absolutely no reason to lead that person or to give that person ***Miranda*** warnings.

N.T., 10/21/11, at 34-35.

While acknowledging the uniqueness of the fact pattern presented, the Majority summarily reverses the learned juvenile court. Taking the juvenile court to task for reaching its conclusions without citation to authority, ***see Majority*** at 10, the Majority, with little or no analysis, reverses the juvenile court due largely to its belief that the juvenile court mistakenly focused on the immigration fraud purportedly perpetrated by B.T.'s father. ***See id.***, at 12. The question of whether such fraud was perpetrated in this case is not properly before us. Nevertheless, in reversing the juvenile court, the Majority permits B.T. to benefit from any such deception.

Finally, I must take issue with the Majority's characterization of my disagreement as a "back door way of injecting the Fourth Amendment good faith exception into the analysis of ***Miranda*** violations. Such is unjustified given the distinction between the rights at issue and the conduct sought to be deterred by the exclusionary rule." ***Majority***, at 13 n.10 (citing ***People v. Smith***, 31 Cal.App.4th 1185, 1192-93 (Cal.App.2 Dist 1995).

I am fully aware of the well settled principle that the exclusionary rule applies to dissuade unlawful police conduct. ***See Commonwealth v. Williams***, 2 A.3d 611, 619-21 (Pa. Super. 2010) (***en banc***) (providing a thorough discussion of the purposes of the exclusionary rule). I am also aware that, unlike its federal counterpart, under the Pennsylvania constitution, there is no good faith exception to the warrant requirement. ***See generally***, ***Commonwealth v. Antoszyk***, 38 A.3d 816 (Pa. 2012). Finally, longstanding Pennsylvania precedent has refused to extend a "good

faith" exception to the ***Miranda*** requirements. ***See e.g.***, ***Commonwealth v. Ramos***, 532 A.2d 465 (Pa. Super. 1987).

Here, none of these principles is germane to the suppression issue presented. Rather, as noted above, before a person is entitled to ***Miranda*** warnings he or she must be in custody ***and*** subject to interrogation. ***Umstead***, ***supra***. My review of the record amply supports the learned juvenile court's conclusion that B.T. was not in custody on July 1, 2011. Without custody, there can be no "custodial" interrogation. Thus, B.T's statements were not subject to suppression based upon a ***Miranda*** violation.

For all of the above reasons, I would affirm B.T.'s dispositional orders in each case.